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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1175

DELTA AIR LINES, INC.,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER DELTA AIR LINES, INC.

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In its Brief in Opposition, McDonnell Douglas Corporation (MDC) has raised several arguments and cited several cases in a manner that calls for response.

MDC, in its seventeen page statement of the case, has gone to great lengths to confuse the issue presented in this case, *i.e.*, whether the exculpatory clause which relieves MDC, a federally regulated manufacturer of aircraft, from civil responsibility for a violation of a federal aviation regulation is void as being contrary to public policy. Through this long statement of facts MDC has attempted to show that the public interest is not really involved and that federal regulation of aviation safety is not actually undermined by such exculpatory clauses. Also, in

its argument, MDC has selectively quoted California cases in a way which obfuscates the clear law of California as to the validity of contracts which relieve a party from civil responsibility for a violation of law.

MDC maintains in its brief that it did not actually exempt itself from liability by way of the exculpatory clause, but that the warranty and exculpatory provision constitute a "risk-fixing" device pursuant to which "Delta and MDC agreed in advance upon Delta's rights and MDC's obligations, responsibilities and liabilities in the event of a 'violation of law' or other deficiency in performance on the part of MDC." (Brief in Opposition, pp. 19-20.) It is noteworthy that MDC now acknowledges that the clause *was intended to cover violations of law by MDC.* The only question remaining is whether the object of the exculpatory clause was either "directly or indirectly" to exempt MDC from responsibility for such a violation of law. See §1668 of the California Civil Code.

MDC now speaks of its obligations, responsibilities and liabilities under the "risk-fixing" device but this is entirely inconsistent with MDC's earlier statements that "none of the damages sought fall within the category of recoverable damages specified in the Warranty Article of the Purchase Agreement." (See MDC Brief in Support of Motion for Summary Judgment, p. 3.) It is thus seen that regardless of the euphemism now employed by MDC to make the exculpatory clause more palatable, the fact of the matter is that MDC denies that Delta can ~~revoer~~ recover any part of its claim under the warranty/exculpatory clause and that the object of the exculpatory clause is nothing more or less than an attempt by MDC to relieve itself of responsibility in damages for its own negligence and violation of the law. The cases cited at pages 10-11 of Delta's petition show that under such circumstances the California courts have *uniformly* stricken down the exculpatory clause.

MDC would have the Court believe that such "risk-fixing" is perfectly acceptable, even though a violation of law is involved, because the parties agreed to it (despite Delta's

contention that it had no choice.)[1] Delta submits that the so-called "risk-fixing" which exempts MDC from civil liability flowing from its violation of the law is no more permissible under the applicable law than price-fixing in an antitrust setting because the public interest and public policy cannot allow it. If this is not so, there is no validity to the rules stated in Section 575(1) of the Restatement of Contracts, Section 1668 of the California Civil Code and the principles announced by this Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). (See Delta's Petition, pp. 9-11.)

MDC also emphasizes that the rights of passengers are not compromised and that MDC remains responsible to the FAA, despite the exculpatory clause, so that the exculpatory clause does not affect the public or third parties. This is incorrect, however, because it is impossible to divorce the private interests of the parties from the public interest in a matter such as this.

What is involved is the safety of commercial aircraft, a subject in which the Federal government has an overriding public interest as is evidenced by the government's comprehensive regulation of aircraft manufacturers such as MDC. To say that this is only a private matter between MDC and Delta is to ignore the obvious fact that a defect in an aircraft can injure or kill large numbers of passengers. That they or their estates could recover against MDC and that MDC would still be responsible to the FAA for violating regulations does not remove the public interest. Surely the passengers would prefer not to be injured or killed in the first place. It is the public interest to *discourage* negligence and violations of the law

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[1] Delta's witnesses at the trial testified that because of Delta's existing fleet of DC-8's and the need for fleet uniformity, along with Delta's route structure and the efficiency of the stretched DC-8, it was not feasible to purchase any other aircraft than the stretched DC-8. Even though other aircraft obviously were available, none presented a real alternative because of Delta's particular needs. MDC states that Convair 880 aircraft were available under contracts not containing an exculpatory clause, but Delta's witnesses testified that even if these aircraft were suitable for Delta's maturing long haul routes, which they were not because of capacity limitations and high operating costs, *they were no longer in production when Delta ordered the aircraft involved here.*

before they occur and if MDC may continue to avoid civil liability for negligence and violations of law through contract then the policy of discouraging such conduct, embodied in the federal regulations, is thwarted.

It is well-accepted in virtually every jurisdiction in this country that the law will not lend its authority to the enforcement of such contracts. Section 575(1) of the Restatement of Contracts, as quoted by the court in *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F.2d 253 (9th Cir. 1965), is directly in point:

> "A bargain for exemption from liability for the consequences of a wilful breach of duty is illegal, *and a bargain for exemption from liability for the consequences of negligence is illegal if * * * (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.*" [emphasis added]

MDC is a party charged through the federal aviation regulations with a duty of public service in the manufacture of aircraft and through regulations it is required to adhere to the highest reasonable standards of safety. The exculpatory clause relieves it of liability for negligence in the performance of this duty. And, of course, MDC receives compensation for its sales of aircraft.

The California law is even more explicit, particularly with regard to contracts which relieve a party of responsibility for a violation of law. MDC has attempted to obscure this by citing and quoting cases or passages of cases which deal with circumstances *where no violation of law was involved*.

In *no* case cited by MDC has a California court found that an exculpatory clause could constitute a valid defense to an action for damages where the conduct causing the damages constituted a violation of law. There are no such cases to Delta's knowledge, but the cases cited in Delta's Petition (pp. 10-11) show that in *every* case where this situation has been presented the California courts have held the exculpatory clause invalid.

At page 19 of its Brief, MDC quotes the leading California case of *Tunkl v. Regents of the University of California*, 32 Cal. Rptr. 33, 383 F.2d 441, 446 (1963) as follows:

> ". . . obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party."

This quotation is hardly a fair or complete representation of the court's treatment of the question presented in that case in which the court struck down an exculpatory clause similar to the one under consideration here.

In referring to §1668 of the Civil Code, the *Tunkl* court, after referring to a number of cases which hold unequivocally that a release from negligence contract is void, and others which had not interpreted the statute so strictly, said:

> "In one respect, as we have said, the decisions are uniform. The cases have consistently held that the exculpatory provision may stand only if it does not involve 'the public interest.' "

The court went on to describe generally factors for determining when the "public interest" is involved. These included the factor that the contract "concerns a business of a type generally thought to be suitable for public regulation. The party seeking exculpation is involved in performing a service of great importance to the public which is often a matter of practical necessity for some members of the public."

MDC's business is not only of the type generally thought to be suitable for public regulation, it is in fact subject to very stringent regulation by the federal government. Moreover, MDC's service of manufacturing aircraft is of great importance to the public, and transportation on such aircraft is a matter of

practical necessity for many members of the public.[1]

The court went on to say that the "public interest" cannot be narrowly defined, saying:

> "We must note, finally, that the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole. We cannot lightly accept a sought immunity from careless failure to provide the hospital service upon which many must depend."

Similarly, many must depend upon the responsibility of MDC in manufacturing aircraft and the question of whether this responsibility is fulfilled is very much a matter involving the public interest.

It thus is seen that the incomplete quotation of the *Tunkl* case cited by MDC is misleading and that *Tunkl* by no means stands for the proposition that an exculpatory clause may be upheld even though a violation of law is involved. As was pointed out in Delta's Petition, *Tunkl* dealt with cases *less clear* than the violation-of-law cases. It was implicit, if not explicit, in *Tunkl* that exculpatory clauses in such cases clearly are invalid. See 32 Cal. Rptr. at 35.

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[1] In *Delta Air Lines, Inc. v. Douglas Aircraft Company, Inc.*, 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965), the court improperly distinguished *Tunkl* by confusing Delta's business with that of MDC and concluding that Delta was not acting as a common carrier when it purchased the aircraft from Douglas. The relevant consideration was whether *MDC*'s business was suitable to regulation and whether *MDC* was acting as a manufacturer of aircraft when it sold the aircraft to Delta, as Delta pointed out in briefs below.

In sum, MDC has not shown and cannot show that the exculpatory clause does not exempt it from liability for a violation of law or that the public interest is not involved in this case. Accordingly, Delta's Petition for Certiorari should be granted so that the Court may consider fully the very important question presented in this case.

Respectfully submitted,

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